IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

---

ANTON JOHANSON,
*Plaintiff in Error.*

*vs.*

THE STATE OF WASHINGTON,
*Defendant in Error.*

No. 282.

---

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

---

## REPLY BRIEF FOR THE PLAINTIFF IN ERROR.

---

Defendant in error makes four points in its brief which might be considered by the Court as material, all of which can be successfully answered. They are:

1st. The question of whether or not the land in controversy was selected because of Sections 16 and 36 being fractional in quantity; that is, deficient because of a part of the sections being under water.

2nd. The question of Phillip H. Lewis' authority to make any selection under the act of February 26, 1859.

3d. The effect of the selection and approval by Secretary Smith made May 24th, 1895.

4th. The effect of the act of December 20th, 1892.

First. With reference to the first question we contend that the natural inference to be drawn from the stipulated fact that Lewis selected under both the acts of March 2, 1853, and February 26, 1859, is that he was selecting lands in lieu of deficiencies arising from natural causes. There could have been no other reason for his assuming to act under the authority of the act of 1859.

But we are not compelled to resort to inference with reference to this question for in the case of Sharpstein vs. State of Washington, 13 Land Decisions, 378, cited by defendant in error on page 6, of his brief, the Secretary of the Interior in his decision with reference to a piece of land lying in the same township in which the land in this controversy lies and involving the same selection, said:

"Township 25 North, Range 4 East, is covered in part by Lake Washington, Union Lake, Green Lake and Elliott Bay. The public survey approved in 1863 shows the township to contain 13,504.32 acres. Sections 16 and 36 of that township have respectively 341.76 acres and 83.25 acres section in place, making a total of 425.01 acres."

Again, in the same decision he said: "As to the right of Washington Territory to select under the act of 1859, but little need be said. The act of 1859 is a general provision applicable alike to all the states and territories and

the Department has universally so held, as far as I am advised, authority was therein conferred for the selection of indemnity land to cover deficiencies caused by fractional school sections.

Second. In reply to the second question, that is, of Phillip H. Lewis' authority to make the selection under the act of 1859, instead of the Secretary of the Treasury, defendant in error points to the fact that the act of March 2, 1849, transferred the duties of the Secretary of the Treasury to the Secretary of the Interior with reference to all land matters.

This transfer of authority from the Secretary of the Treasury to the Secretary of the Interior was ten years prior to the act of February 26, 1859, Is it not to be presumed that in passing the act of February 26, 1859, ten years later, when Congress was dealing with the subject, they were aware of the duties of the two officers, and does not their act at this later date designating the Secretary of the Treasury as the particular officer to make selection emphasize the fact that Congress wanted the Secretary of the Treasury to make this selection and not the Secretary of the Interior? May Congress not have had in mind the fact that it would become the duty of the Secretary of the Interior to approve the selection and have named the Secretary of the Treasury as the particular officer to make this selection in order that the selection might not be in the ridiculous position by having to be approved by the same person who made it?

Third. As to the effect of the new selection made by the State of Washington and the approval of that selection made by Secretary of the Interior Hoke Smith, May 24th, 1895, and set forth in full on pages 7 and 8 in the brief for defendant in error:

There seems to be no room to doubt that this is a new selection. It is clearly shown by the Commissioner's letter accompanying the list to Secretary Smith for his approval also quoted in full in the brief for defendant in error on page 7, where the Commissioner describes the lands as those "selected in the Seattle Land District, State of Washington, *by a duly authorized agent of said state.*" He also refers to the list as "List No. 1," whereas the list under which the land in controversy was originally selected was list "No. 2." (See Brief of Defendant in Error, page 7; also findings in transcript of record, page 4.)

There never was an authorized agent of the State of Washington until after the passage of the act of March 26, 1890, by the Legislature of the State of Washington found in the Laws of Washington for 1890, page 286, hence a selection by an authorized agent of the State of Washington could not have been made prior to March 26th, 1890.

Again, the list of selections made by Phillip H. Lewis, May 24th, 1870, embracing the lands in question, was filed in the Land Office at Olympia, Washington, there

being at that time no Seattle Land Office. (See Transcript of Record, page 4.)

The fact that Secretary Smith found it necessary to approve the selection shows it to be a new selection because the list No. 2, of May 24th, 1870, was approved by Secretary C. Delano, January 27, 1872. (See Transcript of Record, page 4.)

The approval of Secretary Smith made May 24th, 1895, was in the exact language used by Secretary Delano, May 24th 1870, and it is not fair to presume that Secretary Smith was doing a useless act.

The State in order to have made a new selection and avail itself of the new acts in its behalf, namely, the acts of February 22, 1889, and February 28, 1891, by a new selection, must have waived all its rights under the old selection and taken the land subject to the rights of this appellant who was occupying the land and insisting upon his right to the land under his homestead entry.

Secretary Smith recognized that this question existed and justly reserved the rights of this claimant in his approval quoted in full on page 8 of brief of defendant in error, by the use of the following language:

"is hereby approved subject to any valid interferring rights which may have existed at the date of selection."

The relative rights of the settler and the State in a case exactly parallel with this, was squarely passed upon

in Barkley vs. The State of California, 6 Land Decisions, page 699, where the Secretary of the Interior held:

"That a selection upon a basis defective in part is valid as a whole;" also, "A defective selection cannot be cured by a relinquishment and amended so as to defeat the rights of claims initiated prior to amendment."

This is a case where the State of California in making a selection of 320 acres of lieu school land under the act of 1859, used as a basis for that selection 43.66 acres that had been used as a basis for a previous selection. After the selection had been made Barkley made application to purchase under the timber act of June 3rd, 1878. The local office rejected his application upon the grounds that the lands were lieu school lands. Thereafter the Commissioner of the General Land office reversed the decision of the local office upon the ground that the selection was void, having been in part made upon a basis that had been previously used. The State of California then relinquished its previous selection where the 43.66 acres had been used in order to cure its selection of the 320 acres, and this the Secretary of the Interior justly held could not be construed to cure the selection as of the date it was originally made so as to defeat the claim of the entryman.

Fourth. With reference to the fourth question, that is, the effect of the act of December 20, 1902. This act seems to be an unjust attempt upon the part of the State to take from appellant in error his rights. There is also another aspect of the affair. It is a confession that the

claims of appellant are well founded. The act as passed is not as quoted in the brief of defendant in error on page 17. He has quoted the bill as originally introduced. Senator Foster and Congressman Jones of the State of Washington, who procured the passage of this act became aware of the claims of this and other litigants for these lands after this bill had been introduced and had passed the Senate, and they procured an amendment to the bill for the purpose of protecting the rights of these litigants, and that amendment consisted of striking out Paragraph I of said act the following language:

"And said lands so selected and located are hereby granted to said State of Washington."

And from Paragraph II the following language:

"And said lands so selected and appropriated are hereby granted to said state."

which makes the act as passed read as folloys:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that in all cases where sections sixteen and thirty-six or either or any of them or any portion thereof have been occupied by actural settlers prior to survey thereof, and the county commissioners of the counties in which said sections so occupied as aforesaid are situated, have, under this act of Congress of March second, eighteen hundred and fifty-three, located or selected other lands in sections or fractional sections, as the case may be, within

their respective counties in lieu of said sections so occupied as aforesaid, the lands so located or selected, when the same have been approved by the Secretary of the Interior, shall be deemed and taken to have been granted to said State by said act of February twenty-second, eighteen hundred and eighty-nine, and the title of said State thereto is hereby confirmed.

"Sec. 2. That where any lands appropriated by Congress to said Territory to compensate deficiencies for school purposes where sections sixteen and thirty-six were fractional in quantity, or where one or both were wanting by reason of the township being fractional, or from any natural cause, whatever, or where section sixteen or thirty-six were patented by pre-emptors, have been selected and appropriated as provided in said act of Congress of February twenty-sixth, eighteen hundred and fifty-nine, the lands so selected and appropriated, when the same have been approved by the Secretary of the Interior, shall be deemed and taken to have been granted to said State of Washington, by the said act of February twenty-second, eighteen hundred and eighty-nine, and the title thereto confirmed.

That leaves this act a mere confirmatory act, if it is anything at all. A confirmation is defined by Black to be: "A contract by which that which was infirm, imperfect or subject to be avoided is made firm and unavoidable.

"A conveyance of estate or rights in esse whereby a

voidable estate is made sure and unavoidable or whereby a particular estate is increased."

Appellant contends that in order to pass any estate by a confirmatory act there must at the time of the passage of the act be what would amount to at least a voidable estate and if this Court should find as we respectfully think they must find that the act of February 22, 1889, was a clear and distinct declaration upon the part of Congress at that time that the State of Washington should not have these particular lands, then there was no estate to be confirmed and this act could have no effect as far as the land in controversy is concerned.

Again, even granting that there was an estate there to be confirmed and that the act of December 20th, 1902, is a confirmatory act, then it can only be urged that the titles which were certified or had attempted to be certified to the State were confirmed and all of those attempts must justly preserve the rights of adverse claimants. The language of Secretary Hoke Smith cited and quoted by defendant in error is as follows:

"Department of the Interior, Office of the Secretary.
"Washington, D. C., May 24, 1895.

"The foregoing list of State of Washington school land indemnity selections (No. 1), embracing fifteen thousand four hundred and seventy-one acres and thirty-seven hundredths of an acre (15,471.37), *is hereby approved*

*subject to any valid interfering rights* which may have existed at the date of selection.

"HOKE SMITH, Secretary."

Secretary Delano's approval is as follows:

"Department of the Interior, Office of the Secretary.
"Washington, D. C., January 27, 1872.

"The foregoing list of school indemnity selections for the Territory of Washington, (No. 2) is hereby approved, subject to any valid interfering rights which may have existed at the date of selection.

"C. DELANO, Secretary."

Hence, this act even if it is held to be a confirmatory act, can only be held to be an act confirming the title to those lands to which there was no claim.

There is grave question as to whether or not this act even amounts to a confirmatory act. The act says, after referring to the lands, that they "shall be deemed and taken to have been granted to said state by the act of February 22, 1889."

This amounts to an amendment to the act of February 22, 1889, with an assertion that it shall be imagined that the Congress of 1889 passed such amendment or intended to. We are not contending that the Congress of 1902 could not pass retrospective laws but can they establish that a former Congress passed an act which that former

Congress clearly did not pass. Some line is drawn upon what Congress by its act of December 20, 1902, was attempting to do by a reference to the committee reports of both the House and Senate Committees. Those reports each contained the following language:

"A similar holding has been made by the Supreme Court of the State of Washington, but as the matter has been questioned in several instances as above stated, it is desirable that a legislative construction of the acts referred to should be had and this is the only purpose of this bill."

This language shows that Congress was not attempting to pass a new act but rather attempting to interpret the acts of previous sessions. Was it not invading the jurisdiction of the courts?

In conclusion defendant in error by his last paragraph of page 22 of brief, attempts to appeal to the Court by reason of some imaginary equity that the state may have. He assumes facts which are not true, because the State has so little or none of this class of lands and it has not attempted to convey the land in question, otherwise it would have had no right to institute this action. The equities in this case lie on the side of the settler who has spent ten long years hewing himself a home out of the timber and if this Court decides adversely to him he must lose his home and his ten years' toil, whereas, if the decision is adverse to the State it loses nothing because it has the right to

select all the lands that have ever been given to it and we must respectfully submit that if equities are to control in this case then the decision of the Supreme Court of the State of Washington must be reversed.

Respectfully submitted,

C. W. CORLISS,

Attorney for Plaintiff in Error.